Hon. Ricardo Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REALNETWORKS, INC., a Washington corporation, Plaintiff, vs. MLB ADVANCED MEDIA, L.P., a Delaware limited partnership, Defendant.	No. CV04-0511FDB DECLARATION OF MARY K. BRAZA

I, Mary K. Braza, hereby state and declare as follows:

1. I am a partner at the law firm of Foley & Lardner LLP. I am one of the attorneys representing defendant MLB Advanced Media, L.P., in this action, and I am admitted *pro hac vice* in this action. I am competent to testify, and this declaration is based upon my personal knowledge.

2. From time to time since the filing of this lawsuit, including during the past few weeks, the parties have engaged in settlement discussions. In late July, RealNetworks' counsel, Ralph Palumbo, raised with me the question of settlement in light of upcoming discovery obligations, which would incur great expense for both parties. Over the past few weeks, the

FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
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Dockets.Justia.com

parties have discussed and exchanged settlement proposals, including on August 13, 2004, and August 17, 2004.

MLBAM suggested in early August that the parties jointly approach the Court for an extension of the September 1, 2004, discovery deadline, in order to afford the parties additional opportunity for meaningful exploration of settlement. In a telephone message August 3, 2004, counsel for RealNetworks refused to agree to jointly approach the Court, despite a professed willingness to pursue settlement. RealNetworks has maintained that position since then.

3. Jurisdictional defects with respect to the plaintiff's diversity claims were raised through a denial of certain alleged facts in defendant's answer, dated March 29, 2004, and specifically in the Joint Status Report to the Court. In addition, I discussed these jurisdictional issues with RealNetworks' counsel Denise Ashbaugh by telephone on the afternoon of July 2, 2004.

4. Attached as Exhibit A is a true and correct image downloaded from the searchable corporate database located at the internet site of the Secretary of State for the State of Delaware. The image shows MLB Advanced Media, L.P. to be a limited partnership established in the State of Delaware. As of August 17, 2004, this image was available at https://sos-res.state.de.us/tin/controller.

5. Attached as Exhibit B is a true and correct image downloaded from the searchable corporate database located at the internet site of the Secretary of State for the State of Delaware. The image shows MLB Media Holdings, L.P. to be a limited partnership established in the State of Delaware. As of August 17, 2004, this image was available at https://sos-res.state.de.us/tin/controller.

6. Attached as Exhibit C is a true and correct image downloaded from the searchable corporate database located at the internet site of the Secretary of State for the State of Washington. The image shows The Baseball Club of Seattle, L.P. to be a limited partnership

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established in the State of Washington. As of August 17, 2004, this image was available at http://www.secstate.wa.gov/corps/search_detail.aspx?name=THE+BASEBALL+CLUB+OF+SEATTLE%2c+L.P.&ubi=601363459#.

7. Attached as Exhibit D is a true and correct image downloaded from the Westlaw website, which in turn accesses the databases of Dun & Bradstreet, Inc. The Dun & Bradstreet database is a reliable compilation of information accessible from public records and other sources. The attached Dun & Bradstreet report shows that The Baseball Club of Seattle, L.P., has as its managing general partner Baseball of Seattle, Inc. As of August 19, 2004, this image could be located by searching for "BASEBALL CLUB OF SEATTLE LP" in the Westlaw database "DUNBR" (Dun & Bradstreet).

8. Attached as Exhibit E is a true and correct image downloaded from the searchable corporate database located at the internet site of the Secretary of State for the State of Washington. The image shows Baseball of Seattle, Inc. to be incorporated in the State of Washington. As of August 19, 2004, this image was available at http://www.secstate.wa.gov/corps/search_detail.aspx?name=BASEBALL+OF+SEATTLE%2c+INC.&ubi=601363455.

9. Based upon information provided in the Declaration of Thomas Ostertag (filed herewith), I believe that Glaser Baseball Corporation is a general partner of Baseball Club of Seattle, L.P. Attached as Exhibit F is a true and correct image downloaded from the searchable corporate database located at the internet site of the Secretary of State for the State of Washington. The image shows Glaser Baseball Corporation to be incorporated in the State of Washington. As of August 17, 2004, this image was available at http://www.secstate.wa.gov/corps/search_detail.aspx?name=GLASER+BASEBALL+CORPORATION&ubi=601379965.

10. Attached as Exhibit G is a true and correct image downloaded from the searchable corporate database located at the internet site of the Secretary of State for the State of Washington. The image shows RealNetworks, Inc. to be incorporated in the State of

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Washington. As of August 17, 2004, this image was available at http://www.secstate.wa.gov/corps/search_detail.aspx?name=REALNETWORKS%2c+INC.&ubi=601523260#.

11. Attached as Exhibit H is a true and correct copy of a letter of August 9, 2004, from Denise L. Ashbaugh, Summit Law Group PLLC attorney for RealNetworks, to Mary K. Braza and Paul Bargren, Foley & Lardner LLP attorneys for MLBAM, regarding the testimony of Tim Wan, an employee of RealNetworks.

12. On August 17, 2004, by letter and by email communication, MLBAM alerted RealNetworks that MLBAM planned to file its Motion to Dismiss on August 19, 2004. At that time, MLBAM asked RealNetworks to stipulate to a dismissal of all of MLBAM's counterclaims without prejudice. RealNetworks, through a letter from its counsel, indicated that it would respond to that request by August 19 or 20, 2004. MLBAM, by letter from its counsel, again requested a response by August 19, 2004. As of the time of this filing, RealNetworks has not responded to MLBAM's request that it stipulate to the dismissal of counterclaims.

13. Attached as Exhibit I is a true and correct copy of a letter of March 24, 2004, from MLBAM to RealNetworks, regarding issues identified by MLBAM relating to RealNetworks' conduct and requesting that RealNetworks take corrective action.

14. Attached as Exhibit J is a true and correct copy of a letter of April 16, 2004, from RealNetworks to MLBAM responding to the letter attached as Exhibit I.

15. I hereby certify that defendant MLB Advanced Media, L.P., has in good faith conferred with plaintiff on the following issues: Obtaining a stay of discovery; obtaining a stipulation of dismissal of MLBAM's counterclaims; and obtaining a stipulation of dismissal of all claims in this lawsuit.

I declare under penalty of perjury under the laws for the State of Washington and for the United States that the foregoing is true and correct.

FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400/Fax: (414) 297-4900

DATED this 19th day of August, 2004 at Milwaukee, Wisconsin.

Mary K. Braza

FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400/Fax: (414) 297-4900

CERTIFICATE OF SERVICE

I do hereby certify that on this 19th day of August, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Ralph H. Palumbo, Lynn M. Engel, and Denise L. Ashbaugh, attorneys for plaintiff, RealNetworks, Inc.

DATED this 19th day of August, 2004.

FOLEY & LARDNER LLP

s/ Mary K. Braza (*admitted Pro Hac Vice*)
Wisconsin Bar Number 1016766
mbraza@foley.com
G. Michael Halfenger (*admitted Pro Hac Vice*)
Wisconsin Bar Number 1024062
mhalfenger@foley.com
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5306
Telephone: (414) 271-2400
Facsimile: (414) 297-4900

ATTORNEYS FOR DEFENDANT
MLB ADVANCED MEDIA, L.P.

GRAHAM & DUNN PC

James L. Magee, WSBA #1294
jmagee@grahamdunn.com
Laurene E. Somerville, WSBA #26345
lsomerville@grahamdunn.com
Pier 70 – 2801 Alaskan Way, Suite 300
Seattle, Washington 98121-1128
Telephone: (206) 624-8300
Facsimile: (206) 340-9599

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Department of State: Division of Corporations

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Entity Details

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File Number:	**3251441**	Incorporation Date / Formation Date:	**06/27/2000** (mm/dd/yyyy)
Entity Name:	**MLB ADVANCED MEDIA, L.P.**		
Entity Kind:	**LIMITED PARTNERSHIP (LP)**	Entity Type:	**GENERAL**
Residency:	**DOMESTIC**	State:	**DE**

REGISTERED AGENT INFORMATION

Name:	**THE CORPORATION TRUST COMPANY**		
Address:	**CORPORATION TRUST CENTER 1209 ORANGE STREET**		
City:	**WILMINGTON**	County:	**NEW CASTLE**
State:	**DE**	Postal Code:	**19801**
Phone:	**(302)658-7581**		

Additional Information is available for a fee. You can retrieve Status for a fee of $10.00 or more detailed information including current franchise tax assessment, current filing history and more for a fee of $20.00.

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Department of State: Division of Corporations

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Entity Details

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File Number:	**3331190**	Incorporation Date / Formation Date:	**12/15/2000** (mm/dd/yyyy)
Entity Name:	**MLB MEDIA HOLDINGS, L.P.**		
Entity Kind:	**LIMITED PARTNERSHIP (LP)**	Entity Type:	**GENERAL**
Residency:	**DOMESTIC**	State:	**DE**

REGISTERED AGENT INFORMATION

Name:	**THE CORPORATION TRUST COMPANY**		
Address:	**CORPORATION TRUST CENTER 1209 ORANGE STREET**		
City:	**WILMINGTON**	County:	**NEW CASTLE**
State:	**DE**	Postal Code:	**19801**
Phone:	**(302)658-7581**		

Additional Information is available for a fee. You can retrieve Status for a fee of $10.00 or more detailed information including current franchise tax assessment, current filing history and more for a fee of $20.00.

Would you like ◯ Status ◯ Status,Tax & History Information Submit

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EXHIBIT B
Blumberg No. 5118

Washington Secretary of State

Corporations Division - Registration Data Search

THE BASEBALL CLUB OF SEATTLE, L.P.

UBI Number	601 363 459
Category	Limited Partnership
Profit/Nonprofit	Profit
Active/Inactive	Active
State of Incorporation	WA
Date of Incorporation	01/23/1992
License Expiration Date	Corporation Not Required to File Annual Renewal

Registered Agent Information

Agent Name	LAWCO OF WASHINGTON INC
Address	1201 THIRD AVE 40TH FLR
City	SEATTLE
State	WA
ZIP	981013099

Special Address Information

Address	LAWCO OF WASHINGTON INC 1201 3RD AVE 40TH FLR
City	SEATTLE
State	WA
Zip	981013099

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EXHIBIT
C

You can find this information at: http://www.secstate.wa.gov/corps/search_detail.aspx?name=THE+BASEBALL+CLUB+OF+SEATTLE%2c+L.P.&ubi=601363459

Rank(R) 1 of 1

Database
DUNBR

BUSINESS RECORD

D&B Completed Analysis: 07-27-2004
Database Last Updated: 07-27-2004
Source: Copyright (c) 2002 by Dun & Bradstreet, Inc.
Current Date: 08/19/2004

COMPANY INFORMATION

DUNS: 08-089-7457
Name: BASEBALL CLUB OF SEATTLE LP,
Address: 1250 1ST AVE S
SEATTLE, WA 98134
Telephone: 206-346-4000

Year Started: 1992

BUSINESS DESCRIPTION

Line of Business: PROFESSIONAL BASEBALL TEAM

SIC Code(s):
7941 PRO SPORT CLUB OPER

EMPLOYEE INFORMATION

Employee Total: 150

COMPANY HISTORY/OPERATIONS/RELATIONSHIPS & OTHER INFORMATION

HISTORY 10/14/03 HOWARD LINCOLN, CEO-CHB BASEBALL OF SEATTLE INC, MNG PARTNER CHARLES ARMSTRONG, PRES BOB AYLWARD, V PRES-SALES- MKTG KEVIN MATHER, V PRES-FIN- BALLPARK OPR The Baseball Club of Seattle, L.P. is listed as a limited partnership with the Washington Secretary of State.
The charter was established on Jan 23 1992.
The charter number is 24513814.
Ownership information provided verbally by Greg Massey, asst controller, on AUG 14 2002.
Business started 1976 by others.
Present control succeeded Jul 1992.
Capital raised by partners.
There are approximately 13 limited partners.
HOWARD LINCOLN.
Active here.
BASEBALL OF SEATTLE INC. Seattle, WA, started 1992.
Operates as a baseball team management firm.
Acts as managing general partner.
CHARLES ARMSTRONG.
Antecedents unavailable.
BOB AYLWARD.
Antecedents unavailable.

EXHIBIT D

Blumberg No. 5118

Copr. (C) West 2004 No Claim to Orig. U.S. Govt. Works

KEVIN MATHER.
Antecedents unavailable.
Business address has changed from 83 S King St, Seattle, WA, 98104 to 1250 1st Ave S, Seattle, WA, 98134.
OPERATION 10/14/03 Operates as the "Mariners", a major league baseball team in the American League (100%).
Sells on a variety of terms including cash and various net terms.
Sells to general public.
Territory : United States and Canada.
Season peaks Feb-Oct.
Business slow Nov-Jan.
EMPLOYEES: 150-500 which includes partners.
Employees peak to 500 during Mar-Sep and drop to 150 during Nov-Feb.
FACILITIES: Leases premises in building.
LOCATION: Central business section on main street.
00-00(3GE /186) 99999 050186186

Copr. (C) West 2004 No Claim to Orig. U.S. Govt. Works
Westlaw

Washington Secretary of State SAM REED

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Corporations

Corporations Division - Registration Data Search

BASEBALL OF SEATTLE, INC.

UBI Number	601 363 455
Category	Regular Corporation
Profit/Nonprofit	Profit
Active/Inactive	Active
State of Incorporation	WA
Date of Incorporation	01/23/1992
License Expiration Date	01/31/2005

Registered Agent Information

Agent Name	LAWCO OF WASHINGTON INC
Address	1201 THIRD AVE 40TH FLR
City	SEATTLE
State	WA
ZIP	981013099

Special Address Information

Address	
City	
State	
Zip	

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EXHIBIT E

Blumberg No. 5118

Washington Secretary of State

Corporations Division - Registration Data Search

GLASER BASEBALL CORPORATION

UBI Number	601 379 965
Category	Regular Corporation
Profit/Nonprofit	Profit
Active/Inactive	Active
State of Incorporation	WA
Date of Incorporation	04/01/1992
License Expiration Date	04/30/2005

Registered Agent Information

Agent Name	PTSGE CORP
Address	925 FOURTH AVENUE STE 2900
City	SEATTLE
State	WA
ZIP	981041158

Special Address Information

Address	
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You can find this information at: http://www.secstate.wa.gov/corps/search_detail.aspx?name=GLASER+BASEBALL+CORPORATION&ubi=601379965

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EXHIBIT
F

Washington Secretary of State

Corporations Division - Registration Data Search

REALNETWORKS, INC.

UBI Number	601 523 260
Category	Regular Corporation
Profit/Nonprofit	Profit
Active/Inactive	Active
State of Incorporation	WA
Date of Incorporation	02/09/1994
License Expiration Date	02/28/2005

Registered Agent Information

Agent Name	ROBERT R KIMBALL
Address	2601 ELLIOTT AVE #1000 PO BOX 91123
City	SEATTLE
State	WA
ZIP	981119223

Special Address Information

Address	
City	
State	
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EXHIBIT G
Blumberg No. 5118

You can find this information at: http://www.secstate.wa.gov/corps/search_detail.aspx?name=REALNETWORKS%2c+INC.&ubi=601523260

SUMMIT LAW GROUP®
a professional limited liability company

DENISE L. ASHBAUGH
DID: (206) 676-7094
E-MAIL: *denisea@summitlaw.com*

VIA FACSIMILE

August 9, 2004

Mary Kay Braza
Paul Bargren
Foley & Lardner, LLP
777 East Wisconsin Avenue, Suite 3800
Milwaukee, Wisconsin 53202-5306

Re: *RealNetworks v. MLB Advanced Media, L.P.*

Dear Ms. Braza and Mr. Bargren:

In accordance with the Court's July 15, 2004 Order, Tim Wan, a RealNetworks' employee will provide testimony regarding RealNetworks' damages using metrics that RealNetworks collects in its ordinary course of business.

I will call you regarding the other discovery issues tomorrow.

Very truly yours,

SUMMIT LAW GROUP PLLC

Denise L. Ashbaugh

cc: Bill Way, RealNetworks
Ralph Palumbo, Summit Law Group
Lynn Engel, Summit Law Group
Charles Prutting, Summit Law Group

Blumberg No. 5118 EXHIBIT H

MLB.com

March 24, 2004

By Fax and UPS Overnight

Bill Way, Esq.
Assistant General Counsel
RealNetworks, Inc.
2601 Elliott Avenue, Suite 1000
Seattle, Washington 98111

Re: RealNetworks v. MLBAM

Dear Bill:

The lawsuit RealNetworks recently filed against MLBAM has motivated us to scrutinize our relationship – past and present – more carefully than ever. An initial reexamination of that relationship has revealed several issues that require your immediate attention and response:

1. Real.com Misleading Advertisement and SuperPass Subscriber Confusion

A review of the Real.com Website revealed an advertisement for the Real One SuperPass service that is misleading and in violation of federal and state law. A copy is enclosed, and the relevant part is extracted here as follows:

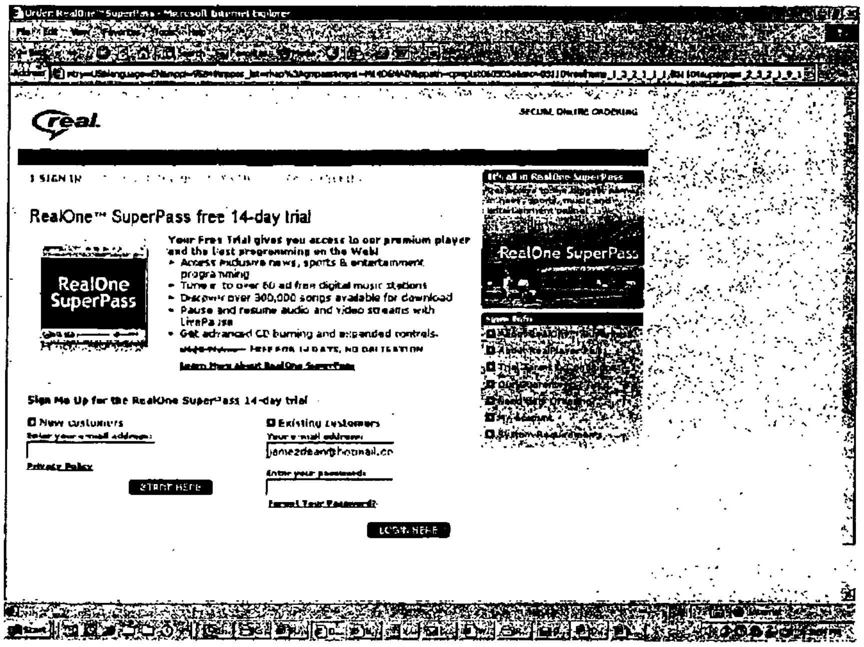

real
RealOne™ SuperPass free 14-day trial
RealOne SuperPass
RealOne SuperPass
START HERE
LOGIN HERE

EXHIBIT
I
Blumberg No. 5118

Having been your partner for over three years, we well know the thought and care that Real takes in preparing and publishing its advertisements for its services. We are therefore troubled by Real's attempt through this advertisement, which has the propensity to mislead, confuse and deceive purchasers into believing that Major League Baseball content remains available to SuperPass subscribers. Indeed, it seems that this advertisement is likely to have the effect of inducing consumers to purchase the service under a false pretense. This is a serious matter, one that has undoubtedly injured MLBAM as well as SuperPass subscribers.

We are also concerned that Real has made no effort to notify existing Real SuperPass subscribers that MLB content is currently not available through that service. As a result, it is likely that those subscribers do not know that their monthly subscription fee no longer affords them the right to view or listen to live or archived MLB Games.

That your failure to advise your subscribers of this change in service is likely to have adversely effected them is highlighted by two facts. First, as you are well aware, from the outset of our contractual relationship in 2001, you informed on-going and potential customers that MLB content was available through Real subscription products. Second, it is clear that you view the termination of content provider relationships as something you need to tell your investors – presumably because you believe that a change of content is likely to affect the number of persons who are willing to buy Real's service.[1] We believe that you have the same obligation to inform the consuming public -- particularly those who have agreed that Real may automatically charge the subscription fee to their credit cards each month -- that Real has terminated its relationship with a major content provider.

We believe that as a result of Real's conduct, it is likely consumers have been confused and deceived about their ability to access MLB content through Real's subscription service. In order to put a halt to any further consumer confusion and deception from occurring, we request that you immediately do the following:

- Remove from your sites, and discontinue all use of, the advertisement referenced above, as well as any other false, misleading, deceptive or confusing advertising or promotional message about Real's services that includes a reference (verbal or graphic) to Major League Baseball.

- Send a remedial message to each SuperPass subscriber informing each that Major League Baseball content has not been available through SuperPass since December 31, 2003. This notice should clearly state that subscribers will no longer have the ability to access any MLB games in either audio or video format through the

---

[1] In Real's Form 8-K filed on January 29, 2004, Real disclosed as follows: "The second potential event relates to the possible cost of restructuring RealNetworks' relationship with a content provider whose content as of the first quarter is not being used in RealNetworks' primary video subscription services."

SuperPass subscription. Consistent with our February 8, 2004 "summary of terms" (as Mr. Jacobson described it), we must approve the notice prior to its distribution.

- To the extent you continue to advertise the availability of any baseball-related sports content through the Real SuperPass, place a clearly worded notice on your site that Real has no affiliation with Major League Baseball and has no right to distribute MLB games or other content. Again, consistent with the summary of terms, we must approve the notice.

- Agree to a joint press release that explains to the public the limited nature of our 2004-05 agreement and makes clear that Real has no rights to collect, encode or distribute MLB games or other content.

2. Japan.real.com False Advertisement

Real's guide to its Japanese site also until recently contained a false advertisement. As the enclosed March 11, 2004 screenshot demonstrates, Real made unauthorized use of MLB logos and trademarks. Real's site also falsely states (according to our translation): "You can subscribe to watch the streaming of MLB Games (pay service). Enjoy the essence/true meaning of baseball. (This product's contents are in the English language.)" As RealNetworks is well aware, it is not authorized to sell subscriptions to MLB games in Japan or elsewhere. This false advertisement not only confuses consumers about the extent of Real's existing rights to Major League Baseball content, but it also tortiously interferes with MLBAM's current and future content distribution agreements in Japan and elsewhere. We are currently evaluating whether this false advertising also violates Japanese law.

In order to halt any further consumer confusion and deception from occurring, we request that you immediately remove the advertisement from japan.real.com (and from any other website on which it occurs), and remove any other false, misleading, deceptive or confusing advertising or promotional message about Real's services in Japan that includes a reference (verbal or graphic) to Major League Baseball.

Further, to the extent you continue to advertise the availability of any baseball-related sports content through japan.real.com we request that you place a clear notice on your site explaining that Real has no affiliation with Major League Baseball and has no right to distribute MLB games or other content. (Again, that notice is subject to our approval.)

We understand that japan.real.com sold a subscription product that included MLB content in the past. In light of this fact, we also believe it is in the public interest for Real to send a remedial message to each japan.real.com subscriber informing each that Major League Baseball content has not been available through Real's subscription service since December 31, 2003. This notice, subject to our approval, should clearly state that subscribers will no longer have the ability to access any MLB games in either audio or video format through the Real subscription product.

3. Indemnification for Acacia Claims

Again, so that we can achieve a full and final reconciliation of issues, we will need your definitive answer with respect to our October 3, 2003 letter demanding indemnification for allegations made against MLBAM by Acacia Technologies. Most recently, you said that the claims "may" be subject to indemnification in the Joint Defense Agreement we discussed.

As you are aware, we have continued to receive additional communications from Acacia. We have provided these communications to you, but have not provided a response. In the latest communications, Acacia's counsel has asked to meet with us during the period March 22 – 25, 2004 to discuss their patent infringement claims against MLBAM. So through this letter we ask for your definitive position with respect to this matter. Also, please let us know how we should respond to the repeated inquiries from Acacia. If we do not hear back from you, we intend to hire counsel to represent us in connection with Acacia's claims and to meet with Acacia and its attorneys, without prejudice to our rights as indemnitee. We will require Real to reimburse us for our counsel's services in dealing with this matter.

4. Digital Download Service

Also, we have an issue with respect to digital download services that you provided to MLBAM and its customers. Simply put, we jointly marketed the individual sale of MLB archived games by which the customer would have the ability to complete a digital download of an entire MLB game for the fee of $3.95. We marketed this service through our site, on the express understanding that Real would provide the technology to enable to customer to download the game. We sold approximately twenty-two thousand one hundred and ninety-six (22,196) such downloads and split the fees we collected with you. Some existing customers have never completed the digital download of the game even though they paid for the right to do so.

We need to know whether you will continue to support the digital download products that were sold and paid for under the March 21, 2001 agreement. If you will not agree to do so, we believe it is necessary to notify our customers that our technical service provider is no longer willing to provide this service and that MLBAM will give those customers who have not yet downloaded the games a refund. We will, of course, expect you to return amounts you received for downloads that Real never delivered. We also request that you provide an immediate answer to this item so that, if necessary, we may promptly begin the notification and refund process.

5. Real Player and Real Advertising During MLB Games

Pursuant to the February 8, 2004 summary of terms, RealNetworks has no rights to distribute content. Likewise, RealNetworks has no rights to promote or advertise Real or its products or services in connection with MLB games (with the exception of the free weekly audio game, which we agreed could be broadcast in the 3 pane RealPlayer experience provided the advertising is not overly aggressive.) Therefore, we are requesting that you assure us that no advertising or promotion streaming of Real products or services or those of third parties will take place during the broadcasting of 2004 season MLB games whether in audio or video, regardless of whether the content is live or archived. We note that the RealPlayer currently distributes advertisements of Real products and services during archived and live MLB games that are being streamed from MLB.com. We object and request that you immediately cease this practice.

This letter reserves all rights MLBAM has with respect to Real Networks, including, but not limited to, rights to inspect and audit Real's records pursuant to Section 9.4 of the March 21, 2001 agreement.

Because a number of issues require immediate action on the part of MLBAM, we request a response to this letter no later than Friday, March 26, 2004. Thank you, and we look forward to hearing from you.

Very truly yours,

Michael J. Mellis
Senior Vice President
and General Counsel

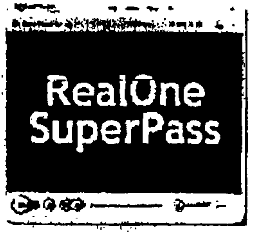
Enclosures

cc: Mary K. Braza, Esq. – Foley & Lardner real.

SECURE ONLINE ORDERING

1 SIGN IN

RealOne™ SuperPass free 14-day trial



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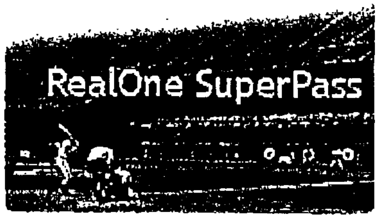

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- スポーツ
- グラビア・アイドル
- ラジオ・TV

FRIDAY, 12 MARCH

日本代表正GK 楢崎正剛動画メッセージ

ドイツW杯アジアー次予選オマーン戦の翌日、チーム合流前のつかの間のオフに撮影したメッセージをどうぞ。

Sports@nifty LOW HIGH PAGE

「club.nakata.net」
セリエA・ボローニャに移籍し今後のシーズンの活躍が期待される中田英寿選手とコミュニケーションできるオフィシャルサイト。
中田英寿公式HP制作プロジェクトチーム PLAY PAGE

ラウル・ゴンザレス独占インタビュー!!
あの常勝オールスター軍団、レアルマドリードのキャプテンにして、世界最高最強のFWである、ラウル選手の独占インタビュー映像！
グローバル・エキスパート株式会社 PLAY

Major League Baseball
MLBをストリーミングで観戦できる有料サービス。ベースボールの真髄をお楽しみ下さい。（本コンテンツは英語でのみお楽しみいただけます）
MLB.com PAGE

『PRIDE』オフィシャルサイト
サイト右側の"PAST LIST"と、右側の"MOVIE"で、記者会見や過去の試合のダイジェスト映像などを観られます。
So-net PAGE

DOWNLOAD NOW
PLAYER PLUS
free trial

RealGuide人気ラジオステーション

1. Pop Hits(RadioPass)
2. JJazz.Net
3. Smooth Jazz(RadioPass)
4. Jazz Nite Club (RadioPass)
5. The #1 Station (RadioPass)

無料メルマガ「リアルニュース」

お役立ちメール・マガジン登録はこちらのページで

最新情報満載のストリーミング・カルチャーマガジン「リアルニュース」を月二回あなたのお手元に

Legal Department
RealNetworks, Inc
2601 Elliott Ave
Seattle, WA 98121

206.674.2700 (p)
206.674.2695 (f)

www.real.com

April 16, 2004

Via Facsimile and U.S. Mail

Michael Mellis
Senior Vice President and General Counsel
MLB Advanced Media, L.P.
75 Ninth Avenue
New York, NY 10011

Re: ***RealNetworks, Inc. v. MLB Advanced Media, L.P.***

Dear Mike:

This letter responds to the issues raised in your letter of March 24, 2004 and your emails concerning the free game of the week that MLBAM is obligated to present exclusively in the RealMedia format. To the extent that issues raised in your March 24 letter also form the basis of MLBAM's counterclaims in the current litigation between Real and MLBAM, this letter states our position with respect to the merits of your counterclaims.

1. Allegedly Misleading Advertisements on Real.com.

Your letter alleges that Real's use on its web page of a "generic" picture of people playing baseball is likely to confuse consumers that Real provides access to MLB games as part of its subscription products or is otherwise affiliated with MLB. We disagree. Our web pages and order paths provide consumers with clear and unambiguous descriptions of *all* content that is available as part of Real's subscription packages. None of those pages mentions MLB games as being included in any package, nor do they use any MLB trademark or logo. No consumer considering a subscription to Real's premium services could reasonably believe that MLB games are included in any Real subscription package.

Moreover, while our subscription products do not include MLB games, they do include access to college baseball games, as well as general sports content that includes news coverage of baseball, including MLB (e.g., Sports Illustrated, CNN, ABC News). Thus, the use of a "generic" baseball picture that does not contain any

EXHIBIT
J

MLB logos, identify any MLB players, or depict any MLB location is proper and not deceptive.

MLBAM also alleges that the existence of an advertisement for post-season MLB games on Real's Japanese website was "unauthorized", amounted to unfair competition, and has harmed MLBAM. The advertisement to which you refer was not unauthorized—it was placed on the website at MLBAM's request last Fall to promote the post-season. Consumers who clicked on the advertisement were sent to an MLB.com web page, where they were given the opportunity to purchase MLBAM products from MLBAM. Although Real concedes that this advertisement inadvertently remained on our Japanese website for a few weeks after the original contract expired, MLBAM was not harmed. If anything, the result was free promotion of MLBAM's products. Real removed the advertisement on its own initiative on March 16, 2004, before receiving your letter of March 24.

2. Alleged "advertisements" in the RealPlayer during playback of MLB games.

MLBAM's counterclaim alleges that RealNetworks engages in "unauthorized advertising" by serving "pop-up ads" to subscribers who access audio or video webcasts of MLB games made available by MLBAM. This allegation is false. RealNetworks does not and cannot control what ads may or may not be served in its consumer software during the presentation of content by MLBAM or any other third party. To the extent that this allegation refers to messages sent by Real to its software customers via the RealPlayer Message Center, MLBAM's characterization of such messages as "advertisements" is inaccurate. The RealPlayer Message Center is a service that allows RealPlayer users to select customized informational messages on topics such as news, weather, entertainment, and music. The messages must be specifically requested by the end user and can be turned off by the end user at any time. They are not "advertisements".

MLBAM's claim that Real is violating MLBAM's rights by "exposing" subscribers of MLB products to "advertisements for RealNetworks' subscription products, such as Real Rhapsody" in the RealPlayer is equally misleading. The "advertisement" of which MLBAM complains appears in the RealPlayer only if a consumer takes affirmative action to enable a feature on the RealPlayer that finds and displays album information for music tracks that the user is listening to in the RealPlayer. The default setting for this feature is to show information only when such information is available. If a user changes the default setting to leave the feature on at all times, even when there is no specific album information to provide for whatever is being played, then the user may receive other music information, such as an invitation to try the RealRhapsody music service. We note also that since MLBAM serves games within an embedded player window, a consumer would also have to take the affirmative step of changing the presentation format of the display so that the game appears in the full

RealPlayer, rather than as an embedded player window. In other words, a consumer has to take several actions to override the default presentation of MLB games in the RealPlayer in order to achieve the presentation reflected in the screenshot attached to MLBAM's counterclaims, and indeed the consumer has to be a reasonably sophisticated user of the RealPlayer in order to know how to do so. Clearly, no such consumer would be "confused" as to the whether MLB sponsored or approved the information contained in messages delivered via other features of the RealPlayer software.

MLBAM's allegations that Real is engaging in false advertising and unfair competition on its website and through "player advertising" are frivolous. We therefore request that MLBAM confirm that it will dismiss its counterclaims, with prejudice.

3. Indemnification for Acacia Claims.

RealNetworks will fulfill its indemnity obligations under the March 2001 agreement between RealNetworks and MLBAM. In the event that Acacia asserts a patent infringement claim against MLBAM, and to the extent that such claim is based on the RN Services or the System (as defined in the March 2001 agreement), RealNetworks will defend and indemnify MLBAM as set forth in the March 2001 agreement. To the extent that claims asserted by Acacia are in part included in Real's indemnity obligations and in part outside of Real's indemnity obligations such that the claim must be defended by MLBAM, Real is willing to cooperate with MLBAM in the defense of Acacia's claims.

MLBAM has not responded to the draft Joint Defense Agreement we sent on February 18. We request that MLBAM execute the Joint Defense Agreement so that RealNetworks and MLBAM can more freely discuss the complex issues surrounding Acacia's patents, the RN Services, and MLBAM's activities.

4. Digital Download Service.

We believe it is highly unlikely that any consumer who purchased a downloaded game from MLB.com during last year's season, but failed to complete the download at that time, will now wish to return and complete the download during the 2004 MLB season. Nevertheless, we confirm that, for the balance of the 2004 MLB season, we will continue to support the digital download service for all customers who purchased a game during the 2003 MLB season but never completed the digital download of the game. Please advise us how long MLBAM requests that such customers be allowed to return and receive access to any such game.

5. Free Game of the Week.

Your email of April 5, 2004 argues that because the February 2004 agreement does not specifically mention promotion of the free game of the week, the parties could not agree how to promote them. MLBAM has taken the position that MBLAM has no obligation to promote the free game of the week, and Real has no right to promote those games. MLBAM's stated intention to prohibit Real from promoting the free games harms both Real and MLBAM, and is contrary to the clear intentions for including this provision in the February 2004 agreement.

RealNetworks bargained for the free game of the week to be provided exclusively in Real's format in order to promote the use of Real's technology to a wider audience. An attempt by MLBAM to prohibit Real from informing consumers that the free game of the week is offered in Real's format would deprive Real of the benefits of having the free game in the first place. Moreover, MLBAM must give Real reasonable notice of each week's free game (at least 7 days in advance) so that Real can reasonably promote the availability of the games in Real's format. MLBAM benefits from Real's promotion of the free game because that offers a vehicle to encourage a wider audience to purchase MLBAM's subscription products. In addition to giving Real reasonable notice so that it can promote the free games, MLBAM must promote the free game of the week on the MLB.com website in at least as prominent a manner as was done for this week's free game.

Accordingly, we request that MLBAM agree to (i) engage in good faith promotion of the game of the week on the MLB.com website (and on websites of the two team's playing in that week's free game); (ii) allow Real to promote the game of the week on the RealGuide, so that Real can drive traffic to the game; and (iii) offer free games for all MLB teams over the course of the season in order to reach the broadest spectrum if interested fans.

We don't understand the request in your letter for "access" to the three-pane experience. This is the default experience for encoding content in our formats, and is the format that your technical team has used for the last several years, so they should have no problem replicating it. If your technical team has any questions on this, please feel free to have them contact Matt Deichman.

Your concern about Real sending "advertisements" during the free games is also misplaced. As explained above, Real does not and cannot send advertisements during webcasts originating with a third party. Any information conveyed in other panes of the RealPlayer is essentially controlled by the end user, not Real.

Should you wish to discuss the foregoing, please call.

Sincerely,

Bill Way
Deputy General Counsel
(206) 674-2495

cc: Ralph H. Palumbo, Summit Law Group